IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1222

JULE M. SUGARMAN, Administrator of the New York City Human Resources Administration and HARRY I. BRONSTEIN, City Director of Personnel and Chairman of the New York City Civil Service Commission,

Appellants,

against

PATRICK MC L. DOUGALL, ESPERANZA JORGE, TERESA VARGAS, and SYLVIA CASTRO, individually and on behalf of all others similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR ATTORNEY GENERAL OF THE STATE OF NEW YORK

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TABLE OF CONTENTS

TABLE OF CASES

STATUTES

TREATIES AND INTERNATIONAL AGREEMENTS

MISCELLANEOUS

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A.

The appellees and the *amicus curiae* attempt to buttress their arguments that New York Civil Service Law § 53 should be reviewed under the "compelling state interest test" by urging that two fundamental rights of aliens are

infringed by the statute: the right to interstate travel (Appellees' Brief, pp. 18-19) and the right to work (Brief of the Commonwealth of Pennsylvania as *Amicus Curiae*, hereinafter "Brief for Pennsylvania," pp. 6-8).* The question of whether aliens possess a right to interstate travel is not presented by the case at bar. Assuming *arguendo* that the Court finds the question relevant, aliens do not possess that fundamental right as it has been articulated by this Court. Nor do they possess a fundamental right to work which is affected by § 53.

In order to place the right to travel in issue, the state action under review must prohibit or penalize the exercise of that right. *Dunn* v. *Blumstein*, 405 U.S. 330, 338-343; *Shapiro* v. *Thompson*, 394 U.S. 618, 627-634. In *Dunn*, the Court observed that the state and county durational residence requirements for voting there invalidated "single out the class of bona fide state and county residents who have recently exercised this constitutionally protected right [to interstate travel] and penalize such travelers directly." 405 U.S. *supra* at 338. Accord, *Shapiro* v. *Thompson, supra* at 634, stating that a one year durational residence requirement for public assistance "denies welfare benefits to otherwise eligible applicants solely because they have recently moved into the "jurisdiction." See *United States* v. *Guest*, 383 U.S. 745, 760 (sustaining the application of § 241 of the Civil Rights Act of 1964 to conspiracies whose "predominant purpose" is to prevent or impede interstate travel); *Edwards* v. *California*, 314 U.S. 160, 174 (invalidating statute on Commerce Clause grounds which made it a misdemeanor to bring an indigent person to the state, stating that "[t]he burden upon interstate commerce is intended and immediate; it is the plain and sole function of the statute").

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* The inappropriateness of designating § 53 as a "suspect classification" in order to apply the "compelling state interest test" is argued in Appellant's Main Brief at Point I, Subpoint A, pp. 13-21.

The basis of the classification established by § 53 is alien status not interstate movement. Cf. *Dunn* v. *Blumstein, supra* at 335. Under the statute, the alien newly arrived in the state is treated identically with the longer-term alien resident.* He is neither prohibited nor penalized for traveling. Accordingly, the question of whether aliens possess a right to travel is not reached. *Dunn* v. *Blumstein, supra* at 342 n. 12 (citing the illustration of differing ages for drivers licenses among states as not constituting a penalty on travel since all residents must meet the prescribed age requirement).

To hold otherwise would mean that diversity among state laws, however minimal, itself gives rise to a right to travel claim (Appellees' Brief, p. 18). No support for so broad an application of the right to travel is found in the decisions of this Court. See discussion, *ante* pp. 2-3. Certainly, *Truax* v. *Raich,* 239 U.S. 33, cited by appellees, does not support this proposition. There the Court recognized the alien's "privilege of entering and abiding in the United States" and "in any State in the Union", 239 U.S. *supra* at 39, as consistent with diverse state laws limiting aliens' participation in the distribution of public resources, 232 U.S. 39-40 (citing e.g., *McCready* v. *Virginia,* 94 U.S. 391; *Patsone* v. *Pennsylvania,* 232 U.S. 138, and in public employment, 239 U.S. *supra* at 40; *Heim* v. *McCall,* 239 U.S. 195. The concern that aliens not be "segregated in such of the states as chose to offer hospitality." 239 U.S. *supra* at 42, was properly limited to assuring them access to "the ordinary means of earning a livelihood," 239 U.S. *supra* at 41, not nationwide uniformity of treatment.

Assuming *arguendo* that the court finds that § 53 provides a basis for invoking the right to travel, aliens possess

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* The extent of the alien's access to employment in the career civil service is a function of the number of waivers in effect under § 53 subd. 2, not the length of his residence in New York State.

no such fundamental right.* Although the court has not identified this right with any particular provision of the Constitution, *Graham* v. *Richardson, supra* at 375; *Shapiro* v. *Thompson, supra* at 630; *United States* v. *Guest, supra* at 757-759, it has been traditionally considered an incident of national citizenship. *Oregon* v. *Mitchell,* 400 U.S. 112, 285-86 (opinion of STEWART, J.). *Shapiro* v. *Thompson, supra* at 629-631 and opinion of HARLAN, J., dissenting at 666-671; *United States* v. *Guest, supra* at 757-759 and opinion of HARLAN, J. concurring in part and dissenting in part at 763-770.

The alien's privilege of entering and abiding "in any State in the Union," *Truax* v. *Raich, supra* at 39, is not synonymous with the fundamental right to travel. The former derives from federal control of foreign relations and immigration and naturalization, *Truax* v. *Raich, supra* at 39, 42, whereas the latter is constitutionally mandated. The former does not exist except in a qualified or conditional form whereas the latter may not be conditioned except upon a showing of necessity. *Dunn* v. *Blumstein, supra* at 338-343.

The qualified nature of the alien's right to interstate movement is recognized in *Truax* v. *Raich, supra* at 39-40, which did not consider limitations on the public employment of aliens as obstacles to entry and abode. Under international common law, the alien's rights of "sojourn and trade" and "circulation and residence", Borchard, *Diplomatic Protection of Citizens Abroad,* § 24, p. 42 (1927) do not assure him equality of treatment with citizens. To the contrary, they are considered consistent with diverse national limitations which include restrictions on aliens' participation in the career civil service and the professions. Gordon and Rosenfeld, *Immigration Law and Procedure,*

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* The question of whether or not aliens have the right to travel was not reached in *Graham* v. *Richardson,* 405 U.S. 365, 375 or by the three-judge court below (A. 91 n. 3).

§ 1.34a, pp. 1-118-1-122 (rev. ed. 1972); Roth, *The Minimum Standard of International Law Applied to Aliens*, 151-154, 156-160 (1949). American treaty commitments permitting nationals of the other contracting party to travel freely and to choose their places of residence within the United States do not provide for identical treatment for citizens and aliens in the professions* and stand with the limitations on aliens in the federal career service established by the federal executive and Congress. See Appellant's Main Brief, pp. 14-15, 35, 36 and Exhibit "1". No treaty to date has been construed to provide aliens with access to public employment. *Heim* v. *McCall, supra* at 193-194. Moreover, a judicial reinterpretation of an alien's right to travel in the case at bar would impair the bargaining power of the United States with other nations which place substantially identical limitations on the employment of aliens in the career civil service** and jeopardize the constitutionality of such federal legislation as the Alien Registration Act, 8 U.S.C. § 1301 *et seq.*

The *amicus curiae's* argument that aliens possess a "basic" or fundamental right to work which is violated by § 53 is similarly in error (Brief for Pennsylvania, pp. 6-8). *Truax* v. *Raich, supra* at 41, holds only that the aliens must be assured access to the "ordinary means of earning a livelihood" in the "common occupations of the com-

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* E.g. Treaty of Friendship, Commerce and Navigation between the Netherlands and the United States of America, Art. II, cl. 3, Art. VII and Protocol, 8 U.S.T. 2043 (1956); Treaty of Friendship, Commerce and Navigation between the United States of America and Italy, Art. I, 63 Stat. 2255 (1948).

** The *Handbook of Civil Service Laws and Practices* published by the United Nations Department of Economics and Social Affairs, Public Administration Branch, in 1966 lists the following nations, among others, as requiring citizenship for employment in the career civil service: United Kingdom (p. 52), Ghana (pp. 52-53), India and Ceylon (p. 53), France (p. 175), Lebanon (p. 179), Ivory Coast (p. 180), Morocco (p. 181), Tunisia (p. 183), Union of the Soviet Socialist Republics, Czechoslovakia, Poland and Yugoslavia (pp. 382-387).

munity" which do not include public employment, 239 U.S. *supra* at 40. As with travel, the qualified nature of the alien's "right" to work is reflected in both international common law and treaties. Neither affords access to the career civil service or even to the professions.* See discussion, *ante* pp. 4-5.

B.

The arguments of appellees (Appellees' Brief, pp. 12-15, 16-17) and the *amicus curiae* (Brief for Pennsylvania, pp. 14-15) that New York Civil Service Law § 53 conflicts with the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*, and with 42 U.S.C. § 1981 and thus violates the Supremacy Clause have been refuted in Appellant's Main Brief at Point II, pp. 33-37. Appellees' additional arguments that § 53 violates the Supremacy Clause because it conflicts with provisions of treaties in force and with federal policy as expressed in the Equal Employment Opportunities Act of 1964, 42 U.S.C. § 2000e *et seq.*, must also be rejected (Appellees' Brief, pp. 15-16, 17).

The provisions of the United Nations Charter, 59 Stat. 1035 (1945) pledging the member nations to "develop friendly relations among nations based on respect for the principle of equal rights" (Art. 1, cl. 2), "promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion" (Art. 55c) and to "join and separate action . . . for the achievement of [these] purposes" (Art. 56) do not supersede federal and state laws distinguishing between citizens and aliens. *Sei Fuji* v. *State*, 242 P. 2d 617, 619-622 (Cal. Sup. Ct. 1952); *Itatai* v. *Immigration and Naturalization Service*, 343 F. 2d 466

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* Federal laws prohibit aliens, *inter alia*, from registering aircraft (49 U.S.C. § 1401(b)), registering and commanding vessels (46 U.S.C. §§ 221, 236, 242, 50 U.S.C. § 198(b)), operating radio stations (47 U.S.C. § 303) and atomic energy licenses (42 U.S.C. § 2133(d)).

(2d Cir. 1965); *Camacho* v. *Rogers,* 199 F. Supp. 155 (S.D.N.Y. 1961). Cf. *Foster* v. *Neilson,* 27 U.S. [2 Pet.] 253. In the area of fundamental human rights, the Charter states "general purposes and objectives of the United Nations Organization." *Sei Fuji* v. *State, supra* at 620. It does not "purport to impose legal obligations on individual member nations or to create rights in private persons." 242 P. 2d *supra* at 620-621. "[I]t is plain that it was contemplated that future legislative action by the several nations would be required to accomplish the declared objectives, and there is nothing to indicate that these provisions were intended to become rules of law for the courts of this country upon ratification of the charter." 242 P. 2d *supra* at 621. No greater significance can be attached to the precatory language of the Charter of the Organization of American States. 2 U.S.T. 2394 (1948).

Moreover, § 53 does not contravene the principles expressed in either charter. See discussion, *ante* pp. 4-5, 6. As demonstrated by the almost universal exclusion of aliens from the career civil service* the international community of nations, as the United States and the State of New York, does not consider that "principles of equality" between citizens and aliens intend an identity between them in the affairs of state. Access to public employment is assured only to nationals, not aliens. As stated in the Universal Declaration of Human Rights adopted by the United Nations General Assembly pursuant to the principles expressed in the United Nations Charter at Article 21 (U.N. Gen. Res. 217, Dec. 10, 1948, reprinted in Senate Committee on Foreign Relations, Subcommittee on the United Nations Charter, *Review of the United Nations Charter: A Collection of Documents* 247 (1954)):

> (1) Everyone has the right to take part in the government of *his own country,* directly or through freely chosen representatives.

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* See footnote, *ante* p. 5 and Appellant's Main Brief, p. 22.

(2) Everyone has the right of equal access to public service *in his own country.* (Emphasis supplied)

Reliance on the Equal Opportunities Employment Act of 1964, 42 U.S.C. § 2000e *et seq.*, is similarly inappropriate.** Although § 2000e-2 provides, *inter alia,* that it shall be an unawful employment practice to discriminate among individuals on the basis of "national origin", the term national origin refers to distinctions among persons who are citizens and not to distinctions between citizens and aliens. *Espinoza* v. *Farah Manufacturing Co., Inc.,* 462 F. 2d 1331, 1332, 1333, 1334 (5th Cir. 1972); *Mow Sun Wong* v. *Hampton,* 333 F. Supp. 527, 530 (D.C. Cal. N.D., 1971) (construing same term in Executive Order No. 11478, 34 Fed. Reg. 12985 (filed Aug. 8, 1969) providing for equal opportunity in federal employment). Similarly, the International Labour Organisation only prohibits discrimination on the basis of "national extraction," not alienage. Convention Concerning Discrimination in Respect of Employment and Occupation (No. 111), Art. 1 § 1(a) (1958); International Labour Office, *ILO's Action Against Discrimination in Employment* 12-13 (1968); International Labour Office, *Fighting Discrimination in Employment and Occupation* 119-122 (1968); International Labour Conference, *Discrimination in the Field of Employment and Occupation* (Report VII(1)) p. 17 (1957). Even if the term "national origin" were interpreted to include aliens as well as citizens, § 53 must be sustained under the *bona fide* occupational qualification exemption in § 2000e-2(e). See Appellant's Main Brief, Point II, Subpoint B, pp. 22-31.

** 42 U.S.C. § 2000e subsections (a) and (b) were amended by Pub. L. 92-261, 86 Stat. 103 (1972), to include states and their political subdivisions as employers under the act.

C.

The invalidation of New York Civil Service Law § 53 would require the State of New York and its political subdivisions to treat citizens and aliens on an identity of terms for appointments and promotions within the career civil service (Appellant's Main Brief, pp. 28-31). As a result, the conduct of the affairs of government would be placed in the hands of persons who do not, and cannot, bear complete allegiance to the state (Appellant's Main Brief, pp. 22-26).

Neither the appellees nor the *amicus curiae* refute the appellant on this point but seek to persuade the Court that there is no proof that any of the appellees, or any alien in particular, is disloyal to the United States and the State of New York (Appellees' Brief, pp. 10-12; Brief for Pennsylvania, pp. 10-11*).

This Court has already recognized that the alien may be excluded from businesses affected by the public interest because of his identity with his homeland. *Pearl Assurance Co. Ltd.* v. *Harrington*, 38 F. Supp. 411, 413 (D. Mass. 1941) (per FRANKFURTER, J.) aff'd *per curiam* 313 U.S. 549 (sustaining requirement that alien insurance companies doing business in Massachusetts employ citizen resident managers). Even more than the dual national, the alien is subject to obligations which compete and conflict with the demands of positions of public trust. As well, he is subject to circumstances which may compel him "to do acts which would not be compatible with the obligations of American citizenship" and thus with the obliga-

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* The role of Commonwealth of Pennsylvania in this appeal is problematical. Having unsuccessfully defended its exclusion of aliens from welfare benefits, where no question of the identity of the alien with the public interest was involved, *Sailer* v. *Leger*, companion case to *Graham* v. *Richardson*, *supra*, Pennsylvania now sides with the appellees in face of its own legislation which is parallel with that of the State of New York (Brief for Pennsylvania, p. 2).

tions upon the public servant of that citizenry. *Rogers* v. *Bellei*, 401 U.S. 815, 832 citing *Kawakita* v. *United States*, 343 U.S. 717, 733, 736 (per DOUGLAS, J.). Accord, *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 187 (per BRENNAN, J.).

In face of these observations, the choice of the State of New York to conduct its internal affairs through the agency of its own citizens must be sustained and the "separate and independent existence of [the] states and their governments" reaffirmed. *Oregon* v. *Mitchell*, *supra* at 125 (opinion of BLACK, J.).

CONCLUSION

The decision below should be reversed and the complaint dismissed.

Dated: New York, New York, January 3, 1973.

Respectfully submitted,

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